No. 3751

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United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,
Appellant,

vs.

YOUNG YEN and YOUNG SOON,
Appellees.

APPELLEES' PETITION FOR A REHEARING.

GEO. A. McGOWAN,
550 Montgomery Street, San Francisco,
Attorney for Appellees and Petitioners.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

This court decided in part as follows:

> *"Upon habeas corpus proceedings the court below discharged the appellees. From that judgment the Commissioner of Immigration takes this appeal.*
>
> *"We are unable to see on what ground it can be held that the proceedings before the Board of Special Inquiry were unfair. * * * Young Fai made no explanation of these discrepancies, although he was afforded full opportunity to do so. He denied that he had testified in 1897 that he was not married, but he admitted that*

in all other respects the record of his testimony taken at that time was correct. The discrepancies in Young Fai's testimony as to the dates on which his sons were born may be unimportant, but his contradictory statements as to the fact of his marriage and the date thereof may well have been deemed important by the Board of Special Inquiry, and sufficient to discredit Young Fai's testimony that the appellees were his sons. We cannot say, in view of such statements of Young Fai that the conclusion reached by the board was manifestly unfair. It is not the function of this court in habeas corpus proceedings to weigh the evidence or go into the question of the probative facts. It is sufficient in such a case, if there is some testimony to sustain the conclusion reached. Here there was, we think, substantial ground to discredit the testimony which was adduced on behalf of the applicants."

It is felt that this honorable court, when it held "there is some testimony to sustain the conclusion reached", had in mind the decision of the Supreme Court in the case of Chin Yow v. U. S. (208 U. S. 8), wherein it held as follows:

> "And, by way of caution, we may add that jurisdiction would not be established simply by proving that the commissioner and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced.
>
> * * * * * * *
>
> 'But, unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

The Chin Yow decision was rendered on January 6, 1908, and since that time it is contended that very material modifications have been made by the Supreme Court in the stringency of the rules and principles announced and enunciated in that case. In the case of Tang Tun v. Edsell (223 U. S. 673) decided March 11, 1912, or over four years after the Chin Yow case, the question came up as to the power of the court to review the decisions of the Immigration authorities where the conclusiveness of the evidence presented was involved, and in that case the court entertained their legal right so to do, although in the Tang Tun case the evidence was not so conclusive as contended for. The court held:

> "But it is said that the evidence for the applicants was of such an indisputable character that their rejection argues the denial of the fair hearing and consideration of their case to which they were entitled. This contention is not supported."

The next case which arose before the Supreme Court was that of Low Wah Suey v. Backus (225 U. S. 450), which was decided on June 7, 1912. In the Low Wah Suey case emphasis was laid upon the right of the court to review the decision of the immigration authorities in response to the charge that those officials had abused their discretion by deciding against the great mass and weight of evidence, citing the following cases:

The case of *United States v. Chin Len* (187 Fed. 544), decided by the Circuit Court of Appeals, Second Circuit, is a case which takes the view we con-

tend for in this matter. The court, Coxe, C. J., said:

> "The case is much stronger than many of the reported cases where the Chinese persons, seeking entrance, endeavored by the testimony of witnesses to establish their citizenship. In the present case that fact had been judicially determined by the finding of a competent tribunal. The inspector was not justified in arbitrarily disregarding the judgment. He could prove it to be invalid or fraudulently issued, but he could not treat it as a nullity upon mere suspicion and conjecture. He was bound to treat it as valid until its invalidity was established. No relevant question of fact was presented so far as the commissioner's judgment was concerned, or, indeed, upon the question of identity.
>
> "In cases where the relator does not have a fair hearing the writ of habeas corpus is the proper remedy. Chin Yow v. U. S. (208 U. S. 8) * * * and cases cited. We are constrained to hold, therefore, that the hearing before the inspector and the Department of Commerce and Labor were not full, fair and unbiased, and that the decision refusing the relator admission to the United States was not warranted."

The following case presents and upholds the legal jurisdiction that a disregarding of evidence may be of such a character as to constitute what is technically known as an abuse of discretion, although in that particular case itself, it was found, that the abuse did not exist, although the legal principle was recognized. *Ex parte Lee Kow* (161 Fed. 592), Ray, D. J., said:

> "The decision made was neither arbitrary nor unwarranted, and the evidence was not so

> conclusive as to warrant a court in saying that there has been an abuse of power or discretion. Unless the court must say this or is forced to this conclusion by the record, it is its duty to dismiss the writ."

We contend that the immigration officials, acting in a quasi judicial capacity, who obviously have not the learning or the experience of the judiciary, are certainly not more gifted than the men of greater learning, and we therefore contend that the fundamental legal principles are binding upon them. In the case of *Woey Ho v. U. S.* (109 Fed. 888), decided by the Circuit Court of Appeals for the Ninth Circuit, the court said:

> "A court is not at liberty to arbitrarily and without reason reject or discredit the testimony of a witness upon the ground that he is a Chinaman, an Indian, a negro, or a white man. All people, without regard to their race, color, creed, or country, whether rich or poor, stand equal before the law. It is the duty of the courts to exercise their best judgment, not their will, whim, or caprice, in passing upon the credibility of every witness."

The term "abuse of discretion" is thus denied in Cyc. 1-219:

> "An abuse of discretion is merely a discretion exercised to an end or purpose not justified by and clearly against reason or evidence."

The leading case cited in support of this being *Sharon v. Sharon* (75 Cal. 48), in which the court said:

> "The discretion of the court below is a *legal* discretion, to be reasonably exercised. 'Abuse

> of discretion' in making such orders does not necessarily imply a wilful abuse, or intentional wrong. In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason,—all the circumstances before it being considered."

Directly in line and further explanatory of this principle we find cited in *14 Cyc.,* 383, the case of *Rothrock v. Carr* (55 Ind. 334-5), in which it is decided:

> "The words 'to make allowances at their discretion', mean to make allowances according to law, at their discretion. They do not mean an arbitrary, uncontrolled, unlimited discretion, contrary to law, or without authority of law; for where there is no act to do, and therefore, no discretion, not a personal discretion; for to allow the board a personal discretion would give them the power to make law."

As a result of these and other authorities and the presentation upon this point the court held in *Low Wah Suey v. Backus* (225 U. S. 460):

> "In order to successfully attach by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final."

The next case before the Supreme Court was that of *Zakonaite v. Wolf* (226 U. S. 272), wherein the

Supreme Court states the point made by appellant and their answer thereto as follows:

> "In her behalf it was contended in the court below, and is here contended, first, that there was no evidence before the Secretary of Commerce and Labor sufficient to warrant the findings of fact upon which the order of deportation was based;
> * * * * * * *
> "As to the first point, an examination of the evidence upon which the order of deportation was based convinces us that it was adequate to support the Secretary's conclusion of fact. That being so, and the appellant having had a fair hearing, the findings are not subject to review by the courts."

While the Supreme Court itself in re-reviewing these last cases, which they did in the recent case of *Kwock Jan Fat v. White* (253 U. S. 454), appraised the holding of the different cases as follows:

> "(2) It is fully settled that the decision by the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts, unless it be shown that the proceedings were 'manifestly unfair', were 'such as to prevent a fair investigation', or show 'manifest abuse' of the discretion committed to the executive officers by the statute, Low Wah Suey v. Backus, supra, or that 'their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law', Tang Tun v. Edsell, Chinese Inspector (223 U. S. 673, 681, 682; 32 Sup. Ct. 359, 363; 56 L. Ed. 606). The decision must be after a hearing in good faith, however summary, Chin Yow v. United States (208 U. S. 8, 12; 28 Sup. Ct. L. Ed. 369), and it must find ade-

quate support in the evidence, Zakonaite v. Wolf (226 U. S. 272, 274; 33 Sup. Ct. 31; 57 L. Ed. 218)."

From a review of the foregoing authorities it is respectfully submitted that the holding of this court "it is sufficient in such a case if there is some testimony to sustain the conclusion reached", shuts out entirely from judicial considerations the point that the evidence presented upon the holding may yet be of such a conclusive kind and character that to disregard it would be an official abuse of discretion. The court might well see that a condition would arise where there would be "some testimony" to sustain the conclusion reached and yet the "some testimony" in question might be offset by evidence so conclusive in its kind and character that it would be an official abuse of discretion to refuse to be guided by it.

In the present case the reason assigned for the rejection of the testimony is the fact that the father is reported to have volunteered the statement in 1897, "I am not married", when he returned to this country from a temporary visit to China. These two appellees were not born at that time, nor was it claimed that they were begotten as a result of that trip. The father made a subsequent trip to China from which he returned on May 31, 1903, or six years after the time when he was supposed to have made this volunteer statement, and it was as the result of this last mentioned trip that these two appellees were born. The immigration record

in this case is complete and thorough, and covers all matters of family life, and the details of their village in China, and the father and the witness and the two boys were thoroughly and searchingly cross-examined with respect to all of these different matters, and the result was that the weight of this evidence was deemed by Judge Dooling, below, to be of such a conclusive nature and character that to refuse to be guided by it was an official abuse of discretion. The court in its decision apparently limits the right of the trial court to determine whether there was "some testimony" to sustain the department's action, and apparently shuts out what we contend is the greater consideration, and that is whether or not the evidence taken as a whole is of such a conclusive kind and character as to be an abuse of official discretion not to be guided by it. If this larger principle for which we contend is the correct one, and it so seems to us in view of the authorities, we feel that it opens up a larger scope of the question than this honorable court has recognized in its decision handed down herein.

The immigration authorities may assign anything as a ground for the rejection of testimony, no matter how trivial the point may appear to be, and yet it would be some ground to sustain their adverse conclusion, whereas upon the case as a whole the adverse reason urged would be infinitesimal. This is not a point of asking the court to weigh the evidence to see whether the decision was right or wrong in a narrow sense, or whether the court would have

concluded the matter differently were it exercising original jurisdiction over the subject, but it is felt that a just consideration of all the evidence for the purpose of determining whether it is so positive and convincing as to be an abuse of official discretion to disregard it is, we contend, a function of the court, and has been so held by the Supreme Court in the authorities mentioned. That is what we feel was done by Judge Dooling, below, in this case, and after a just consideration of the evidence he felt that notwithstanding there was some evidence to support the department's adverse action, that the clear weight of the evidence was so positive and conclusive that it was an abuse of official discretion for the immigration authorities to refuse to be guided by it.

We feel the general principles enunciated by the Supreme Court in *Kwock Jan Fat,* supra, are pregnant with meaning upon a situation such as is presented here. The court there held at page 570 as follows:

> "(4) The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers

proceed to judgment. For failure to preserve such a record for the information, not less of the Commissioner and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

It is hoped by appellees that the court will respectfully grant their petition for a rehearing.

Dated, San Francisco,
March 15, 1922.

Respectfully submitted,

GEO. A. MCGOWAN,
Attorney for Appellees and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellees and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
March 15, 1922.

GEO. A. MCGOWAN,
Counsel for Appellees and Petitioners.